SC5593-4-1201

DESCRIPTION OF THE CALVIN K. WALBERT LANDS, SEVENTH DISTRICT, KENT COUNTY, MD.

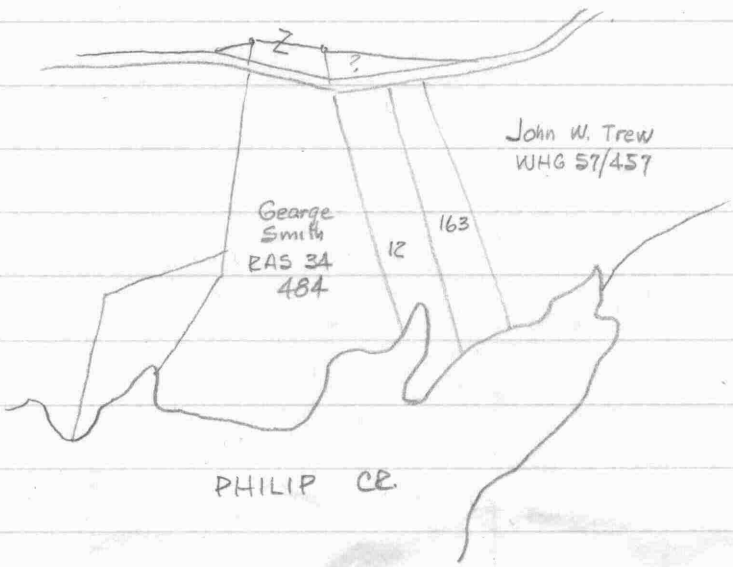
Beginning for the same at a point in the center of Walnut Point Road, said point being the northeast corner of the herein described lands and the northwest corner of the lands of Horace Havemeyer, Jr.; and running, thence, by and with said Havemeyer lands S 06 38 40 E - 17.00' to a concrete monument, S 06 38 40 E - 872.83' to an iron pipe, and S 06 38 40 E - 12' more or less to the mean high waters of Philip Creek; thence, by and with the mean high waters of said creek the six following courses and distances: (1) S 48 22 W - 227.98', (2) N 29 26 40 W - 66.29', (3) N 41 37 30 E - 175.58', (4) N 19 38 W - 86.70', (5) N 06 26 W - 113.96', and (6) S 23 51 20 W - 110.15' to the lands of George Smith; thence, by and with said Smith lands N 09 14 40 W - 85' more or less to an iron pipe, N 09 14 40 W - 711.31' to an iron pipe, and N 09 14 40 W - 17.10' to the center of Walnut Point Road; thence, by and with the centerline of said road S 78 59 20 E - 202.86' to the place of beginning. Containing in all 3.680 acres of land, more or less.

Subject to the right-of-way of Walnut Point Road.

December 1, 1989. William R. Nuttle.

~~S 23° 56' 10" W - 451.85 412.99 183.32~~

MAP 52



12 Calvin K. Wallbert EHP 68/715

163 Horace Havemeyer, Jr. EHP 56/441

Wallbert EHP 68/715

Survey by Marion de K. Smith 1936

Begin pt. on N MHW of Philips Creek at S end of div. line between Trew and J. F. Dorsey

w/Trew N10°08'W - 800 to ℄ rd.

w/rd S79°33'E - 320.5 to new div. line with Trew

w/new line S10°08'E - 824 to creek

"with said water line" - w/s N 34° 37' W - 329.6 to begin

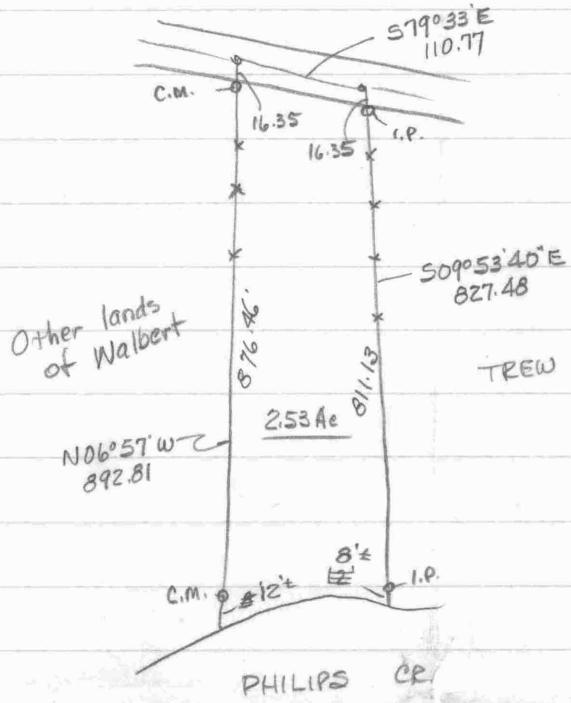
5.509 A.

S&E Wallbert to Finkener EHP 28/298

Being part of RAS 35/219 - same descrip.

" " " RRA 1/381 *

EHP 28/298 - Survey by McC. 1968



876.46
-12
864.46

811.13
8
16.35
835.48
-8
827.48

811.13
16.35
794.78

811.13
-8
803.13

892.81
12
880.81

RRA1/381 - Hartman to Trew

Part 1 - Begin ℄ rd. about 12' from stone on side

w/℄ rd. N16¼°W - 20 330

N17½°W - 30 495

N01¼°E - 8 132 to inter of rds

w/℄ rd to Walnut Pt. S76°W - 24 396

S79°W - 46 759

S 74¾°W - 48.56 801.24

w/ Startt N 83¼°W - 45.72 754.38 to stone

w/ Dickerson S13°E - 49.20 811.80

S81¾°E - 4.28 70.62

S13½°E - 16.20 267.30 to Philips Cr.

w/ water to stone "B.S." 545.82

w/ Hessinger S81°E - 33.08 to stone 1518

N74°E - 92 to begin

S7A 1R 10P

(Cont.)

Dickerson owns between parcels 1 & 2

Chancery Creek

SGF 2/187 gives courses along

N50½°E - 12.80 211.20

N82°E - 9.40 155.1

N09°W - 10.20 168.3

S50°E - 6.36 104.94

N49½°E - 15.44 254.76

S74½°E - 10.24 168.96

S33¾°40W - 15.52 256.08 to stone "B.S."

PLOTTED 1" = 660'

April 24, 1981.

Richard R. Cooper, Atty.
Chestertown, Md.

Dear Dick:

This week I ran a traverse from the intersection of Quaker Neck Road and Walnut Point Road to the area in dispute between Calvin Walbert and George Smith. The enclosed sketch is the result of my survey.

The original description of the Trew property, found in Chancery Records SGF 2/187, fits surprisingly well with Walnut Point Road and the fence line between Walbert and Smith. This description is outlined in red. The description of the Walbert tract, which includes the Havemeyer property, is outlined in green. Allowance was made for a wrong bearing on the closure line along the water. The description of the Smith property is outlined in blue.

The Trew description does not call for Philip Creek until it crosses the point, thereby excluding part of the area around the head of the cove and the tip of the point. This I believe to be in error. The area at the head of the cove on the Walbert side of the fence is low and marshy and could have been considered part of the creek. Likewise, the point, although firm enough to walk on, is essentially marsh. The Walbert deed describes the division line with Smith as reaching the creek at about the same position that it does today. From the southeast corner of Havemeyer to the southwest corner of Walbert is described as "with said water line". Unfortunately, the closure line, N 34 37 W - 329.6', has an obviously bad bearing. The Smith description, outlined in blue, does not include any land east of the fence line.

Waterfront surveys years ago very often cut across coves and excluded points of marsh. The one sticky point is that the Walbert description did not call for the creek at the end of the long line adjacent to Smith, somewhere in the vicinity of McCrone's pipe. I would not have any hesitations, however, in providing a plat showing that Mr. Walbert owns the land that I have outlined in yellow.

Sincerely yours,

RRA1/381 - (cont)

Part 2 - Begin stone on bank on N side of rd to Walnut Pt. on line with Dickerson

w/rd. N84° W - 45.72 754.38

w/ Baker S 25½° E - 9.52 157.08 to stone

S14° W - 55.20 910.80 " "

w/ creek to Dickerson

w/ Dickerson N 39° E - 21 346.50

N 10½° E - 42 693 to begin

16 A, 2 R, 19 P

PLOTTED 1" = 660'

Smith RAS 34/484 - formerly Dorsey

Begin granite stone N ~~side~~ shore Philip Cr. at S end of division line between Trew and Dorsey

w/ Trew N 31° 39' E - 346.5

N 13° 54' E - 693.0 to stone N side rd.

S 78° 45' E - 198.0 to stone and Trew

w/s S 10° 08' E - 882.0 to MHW Philip Cr.

w/ creek S 18° 49' W - 61

S 87° 21' W - 277.2

S 19° 31' W - 237.8

N 71° 15' W - 401.4

N 05° 12' E - 140.0 to begin

10.949 Ac.

S&E 0.382 Ac. lying on N side rd.

PLOTTED 1" = 660'

GBR./des/1/7/82

KEITH WALBERT
Plaintiff

VS.

DORIS T. SMITH
Defendant

. . . . . IN THE CIRCUIT COURT FOR KENT COUNTY

DORIS T. SMITH
Counter Plaintiff

VS.

KEITH WALBERT
Counter Defendant

EQUITY NO. 7254

MEMORANDUM

FACTS

Plaintiff, Keith Walbert, brought this action in equity seeking a declaratory judgment to quiet title to certain property along Philip's Creek in Kent County, Maryland. The particular property in dispute is a narrow, peninsula-shaped portion which was referred to in the pleadings and at the trial as the "toe". In addition to answering denying Plaintiff's allegations, the Defendant, Doris T. Smith, filed a counterclaim seeking to have the Court find that the parcel in dispute is her property.

During the fall and winter of 1980, certain property, including the "toe", was leased to a Matthew Walsh by the Plaintiff for the purpose of hunting wildfowl. Mr. Walsh was prevented from hunting on the "toe", however, after the Defendant, George DeF. Smith[1], had "No Trespassing" signs placed on

[1] A "Suggestion of Death" filed stated that Defendant, George DeF. Smith, died on September 17, 1981, and therefore only his wife, Doris T. Smith, remained as a named Defendant.

the property and threatened further action if this alleged trespassing continued. No subsequent hunting activity took place pending a resolution of the dispute by this Court.

It is Plaintiff's contention that the property in dispute was intended to be included in the legal description of a larger lot of ground conveyed to him by a deed dated June 5, 1976, from his grandmother, Anna E. Walbert. (Deed reference E. H. P. 68, Folio 715 -- "Plaintiff's Exhibit No. 1") Plaintiff's basis for this contention is what has been referred to as the "Nuttle Survey" and the related interpretations and opinions of the surveyor, William R. Nuttle. In the alternative, Plaintiff has claimed possession of the "toe" by adverse possession.

Defendant, Doris T. Smith, through her counterclaim alleged that she is seized and possessed of certain land adjacent to the Plaintiff's property and that pursuant to the so-called "Crowding Survey" coupled with the investigations of the surveyor, Bill Crowding, and her son, James H. Smith, the disputed area should be declared part of the Smith property. Defendant also claims possession of the area in dispute by adverse possession.

DISCUSSION

It is noted by this Court at the outset that the specific area in dispute is not included in the legal descriptions contained in the current deeds held by either Keith Walbert or Doris T. Smith. Surveyors representing both parties testified at trial to what they believed was the proper interpretation of the situation in their respective opinions, but both surveyors conceded that the "toe" portion is presently not included in the metes and bounds description of either deed. Having noted this fact, the Court will examine the principles of law argued to be applicable by the parties as well as any found applicable by the Court.

(1) RELIANCE ON ADJOINING PROPERTY LINE

At trial, Defendant advanced a novel theory under which she claimed the property in dispute should be declared part of the Smith property. Defendant's contention under this theory is that assuming the boundary lines of her property are not settled, it is then proper to rely on the fixed boundaries of the adjacent property, owned by Plaintiff. The Defendant continues by asserting that since the Plaintiff's property boundaries as established from the description in his deed do not include the "toe", the area must then be declared part of the Defendant's property. In other words, Defendant would have this Court use the fixed lines of Plaintiff's lot to show not only the exclusion of the "toe" from Plaintiff's description but also inferentially and automatically, the inclusion of the "toe" as part of Defendant's property.

It is accepted in the law of property that a well established line of an adjoining tract given as a means of locating a boundary ordinarily operates as a monument and therefore controls over courses and distances. H. T. Tiffany, The Law of Real Property, Section 994 at 198 (3d Ed. 1975) The cases which have invoked this principle, however, have done so to establish ownership of a portion of property erroneously included in two legal descriptions or surveys. Dundalk Holding Company v. Easter, 195 Md. 488, 495, 73 A. 2d 877, 879 (1950) (conflicting surveys) accord, Hodgdon v. Campbell, 411 A. 2d 667, 671 (Me. 1980) (1919 deed versus 1952 deed); Kinney v. Central Maine Power Company, 403 A. 2d 346, 350 (Me. 1979) (interpretation of call in deed); Milliken v. Buswell, 313 A. 2d 111, 116 (Me. 1973) (plaintiff's deed versus defendant's survey); Kennett Corp. v. Pondwood, Inc., ___ N.H. ___, 226 A. 2d 783, 786 (1967) (two deed descriptions included disputed property).

In the instant case, Defendant seeks to apply this principle to establish the ownership of property which is not included in the legal description of any deed. To grant the Defendant the "toe" simply upon a showing that the

property is not included in the description of the adjacent owner, using his fixed boundaries as a reference is, in the opinion of this Court, an unwarranted and illogical extension of the adjacent boundary principle.

(2) ADVERSE POSSESSION

Both parties in this case claim possession of the disputed area by adverse possession. Adverse possession requires that the possession be actual, open, notorious, exclusive, under claim of title or ownership, and continuous and uninterrupted for the statutory period of twenty years. Blickenstaff v. Bromley, 243 Md. 164, 170, 220 A. 2d 558, 561 (1966). It has also been noted that the failure to establish any one of these elements is fatal to a claim of adverse possession. See Goen v. Sansbury, 219 Md. 289, 297, 149 A. 2d 17, 22 (1959). As discussed below, both parties have failed to establish at least one of the elements required to successfully establish title by adverse possession.

Plaintiff's claim under adverse possession is deficient in that the intent with which possession was maintained was not hostile or adverse in nature. Although hostile possession does not require ill will, it is nevertheless required that the party claiming the property under adverse possession intended to possess the property as his own and against the rights of the true owner. See Hungerford v. Hungerford, 234 Md. 338, 340, 199 A. 2d 209, 211 (1964). This Court is not unaware of the principle where possession originating in a mistaken belief of ownership may ripen into title by adverse possession. Even under this theory, however, the case law indicates that there is no exception created for the element of hostility which continues as an essential part of a claim under adverse possession. See Jacobs v. Disharoon, 113 Md. 92, 98, 77 A. 258, 260 (1910), 16 Md. L. Rev. 78 (1956).

In the instant case, the Court finds circumstances are such as to rebut the hostile or adverse intent on the part of Plaintiff. In support of this finding, the Court notes that Keith Walbert testified the "toe" was used by his grandfather for hunting purposes. The Court also gives considerable weight to

the testimony of Mr. Trew who has lived and hunted in the area since the 1920's. Mr. Trew testified that he and his family used the "toe" for hunting and other recreational activities with the Walberts' permission and the Walberts subsequently used the "toe" in a similar fashion. In light of this testimony, the Court is unable to find that the Plaintiff had the requisite hostile intent to possess the land adversely.

Defendant's claim under adverse possession is deficient in two areas. It is well settled that the doctrine of adverse possession does not apply to cases where possession is permissive or where possession is with the consent of the owners. Hungerford v. Hungerford, 234 Md. 338, 341, 199 A. 2d 209, 211 (1964). Through the testimony presented at trial, this Court finds as a fact that Defendant and her family used the "toe" for hunting or related seasonal uses only after obtaining the consent of the Walberts. Defendant's possession was therefore permissive in nature and such a factual finding is fatal to a claim of title by adverse possession. The Court finds further that Defendant's possession was not exclusive as required to establish a successful adverse possession claim. See generally Maryland Coal and Realty Company v. Eckhart, 25 Md. App. 605, 622-623, 337 A. 2d 150, 160 (1975). Commenting on this same point it has been stated:

> A possession not exclusive, but in participation with the owner or others, falls far short of that kind of adverse possession which deprives the true owner of his title.
>
> No one individual can claim ownership where the acts of possession have been exercised in common with others.

Thompson on Real Property, Section 2547 at 625-626 (1978). Testimony from Keith Walbert as well as the Defendant's son, James H. Smith, clearly indicated that

others hunted the "toe" portion on a seasonal basis during the relevant statutory period thereby destroying the exclusivity required with respect to Defendant's possession or use.

(3) ACCRETION

Having determined that a fair and equitable resolution of this property dispute is not possible pursuant to the principles governing adverse possession or by relying on the fixed boundaries of the Walbert property, this Court would look to the applicability of the principle of accretion. Before investigating the application of this theory further, it is noted that the Court finds as a fact that the "toe" is not fast land but instead a marsh-type land subject to the ebb and flow of the tide.

The common law right to accretion was restated in Board of Public Works v. Larmar Corporation, 262 Md. 24, 277 A. 2d 427 (1971). The Court of Appeals noted:

> [W]here land lies adjacent or contiguous to a navigable river, in which there is an ebb and flow of the tide, any increase of soil formed by the gradual and imperceptible recession of the waters, or any gain by the gradual and imperceptible formation of what is called alluvion, from the action of the water in washing it against the fast land of the shore, and there becoming fixed as part of the land itself, shall belong to the proprietor of the adjacent or contiguous land.

Id. at 36, 277 A. 2d at 432 (quoting Baltimore & Ohio Railroad Company v. Chase, 43 Md. 23, 34-35 (1875)).

It is noted that the word "imperceptible", when used in connection with the law of accretion, refers only to the progress of the build up and not that the change in the shoreline is imperceptible after a long lapse. Thompson on Real Property, Section 2560 at 15 (1978). In the instant case, therefore, the size of the "toe" does not prevent the application of the principle of accretion.

The Court would also note the original Trew property lines found in Chancery Record S. G. F. 2, Folio 187. These lines, originally plotted in 1894, form a "V" shape not large enough to include the area now in dispute. The Court finds the courses of these lines extremely persuasive authority for the finding that the peninsula-shaped lot of ground is the product of gradual and imperceptible build up and deposit of solid material in such a manner as to cause that to become dry land which was once covered by water. It is also plausible to conclude that in plotting land bounded by navigable water descriptions will vary and may not be as precise as if the boundary was not water. Having determined the principle of accretion is applicable, the Court must now determine which party is entitled to the "toe".

The paramount factor in determining the right to the alluvion in an accretion situation is contiguity. It is noted by one authority that the right to alluvion depends upon the fact of the contiguity of the estate to the water. Thompson on Real Property, Section 2560 at 17 (1978). Before there can be a right to accession or accretion, Thompson notes, there must be an estate to which the accession or accretion can attach. Id. It is further stated that any separation of the claimant's lands from the alluvion deposits claimed defeats the right to the build up. Id.

Applying this rule of contiguity to the instant case, this Court finds the property in dispute, resulting from the process of accretion, is owned by the same party who presently possesses the contiguous estate, namely Keith Walbert, the Plaintiff herein. The Court cannot accept the testimony that it is possible to walk along the shoreline from the Smith property to the "toe" without encroaching on the Walbert property.

CONCLUSION

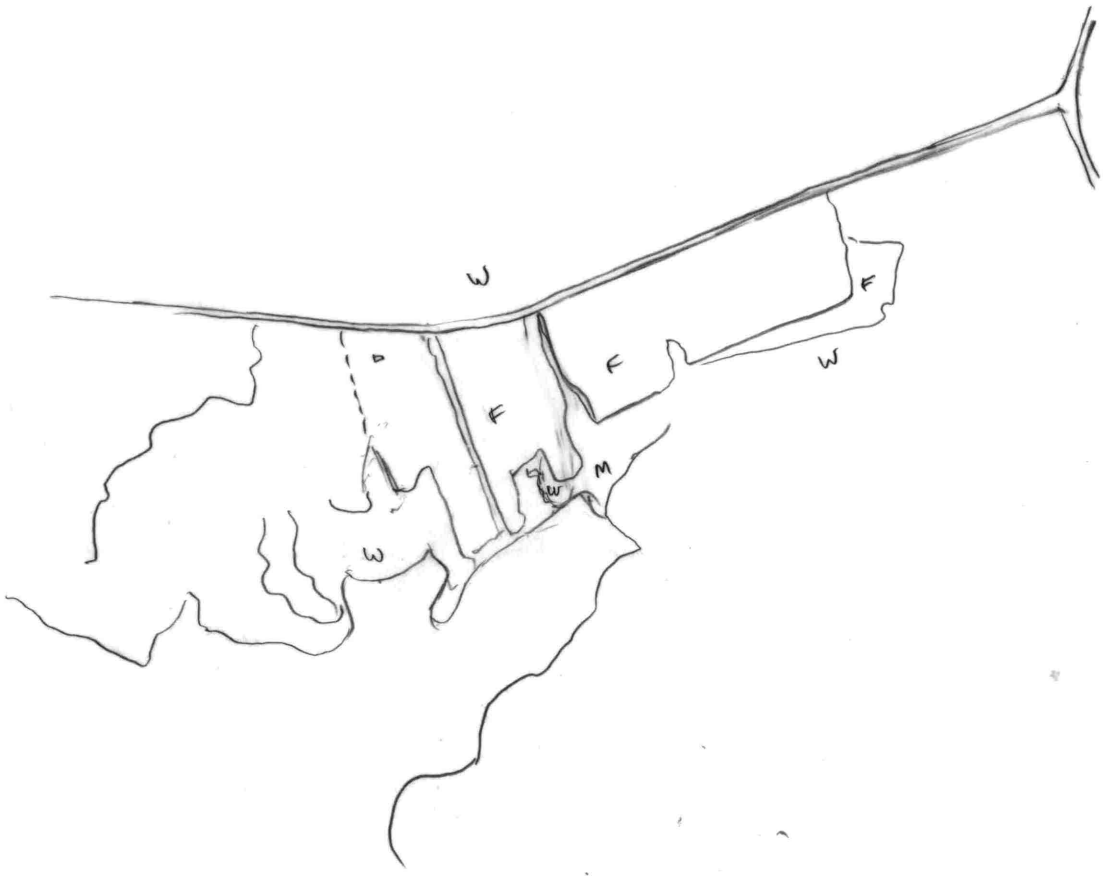
This Court, therefore, finds that the Plaintiff, Keith Walbert, is the owner of the peninsula-shaped property extending outward into Philip's Creek in Kent County, Maryland. A declaratory decree will be signed declaring that the "toe" is the property of the Plaintiff, Keith Walbert. The "toe" shall be included in a metes and bounds description of the property now owned by the Plaintiff to be either set forth within the decree or attached thereto and made a part thereof. The decree should also provide that the Clerk of the Court make a notation at the end of the Plaintiff's deed recorded at Liber E. H. P. 68, Folio 715 in the land record office referring to this case and the Court's declaration.

George B. Rasin, Jr.
Judge

Date: January 8, 1987

Copies to:

Counsel of record


W
F
F
W
D
F
M
W
W

Note: FIRM Map 240045 0200B shows part of this lot to be in Zones A6 and B. All of the buildings, however, are outside of the flood area.

Inspected and re-certified June 24, 1993.

William R. Nuttle

Note: This property was inspected and re-certified Dec. 1, 1989. Additions to the house and the movement of a shed were noted and added to the plat.

William R. Nuttle

STATE OF MARYLAND
WILLIAM RAY NUTTLE
No. 4180
REGISTERED
LAND SURVEYOR

NO.	BEARING	DIST.
1	S 06°38'40" E	901.83'±
2	S 48°22'00" W	227.98'
3	N 29°26'40" W	66.29'
4	N 41°37'30" E	175.58'
5	N 19°38'00" W	86.70'
6	N 06°26'00" W	113.96'
7	S 23°51'20" W	110.15'
8	N 09°14'40" W	813.41'±
9	S 78°59'20" E	202.86'

This is to certify that the improvements indicated hereon are located as shown.

William R. Nuttle

PLAT OF A SURVEY OF THE

CALVIN K. WALBERT LANDS

7TH DISTRICT, KENT COUNTY, MD.

Scale 1"=100' July 1981.

William R. Nuttle, Reg. Surveyor
Chestertown, Md.

I.P. = iron pipe
C.M. = concrete monument

Note: Original Trew property lines, found in Chancery SGF 2/187, oriented from traverse run along Walnut Point Rd. to Quaker Neck Rd.

I.P.

C.M.

I.P.

WALNUT POINT ROAD

CALVIN K. WALBERT (EHP 68/715)

HORACE HAVEMEYER (EHP 28/298)

JOHN W. TREW (WHG 57/457)

GEORGE SMITH (RAS 34/484)

fence line

fence line

Closure line in Walbert deed; bearing in error

I.P.

I.P.

Existing shore line

PHILIP CREEK

SKETCH SHOWING SEVERAL PROPERTIES ON PHILIP CREEK

Scale 1" = 100' April 1981.

William R. Nuttle, Reg. Surveyor
Chestertown, Md.

Note: Original Trew property lines, found in Chancery SGF 2/187, oriented from traverse run along Walnut Point Rd. to Quaker Neck Rd.

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